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June 26, 2006

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BY ELECTRONIC MAIL AND FEDERAL EXPRESS

Robert Schneider, Chair
Members of the Regional Board
c/o Philip Giovannini
California Regional Water Quality Control Board,
Central Valley Region
11020 Sun Center Drive, #200
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Re: August 3/4 Regional Board Meeting – Tentative Waste Discharge
Requirements for the Port of Stockton West Complex Docks 14 and 15
Dredging Project

Dear Chairman Schneider and Members of the Board:

On behalf of the Friends of Riviera Cliffs ("Friends"), Stockton Standing Up, and the Deltakeeper Chapter of Baykeeper, we submit these comments, together with the expert report by Steven Bond filed separately, on the Tentative Waste Discharge Requirements ("WDRs") for the Port of Stockton ("Port") West Complex Docks 14 and 15 Dredging Project ("Project"). We request that Regional Water Quality Control Board, Central Valley Region ("Regional Board") consider these comments before its August 3/4 meeting. This letter addresses primarily the legal and procedural aspects of the WDRs while Mr. Bond's report focuses on the technical aspects of the Project.

Deltakeeper and Friends and their members submitted numerous letters and attachments for the Regional Board's consideration in connection with the Port's proposed dredging of docks 14-20 ("prior project"), and incorporate those herein by reference. In particular, Deltakeeper and Friends were concerned that the Regional Board had not required the Port to characterize the dredge waste as "designated" or "inert" prior to issuing WDRs, that proposed mitigation for dissolved oxygen ("DO") impacts was inadequate, and that the DMD site lacked sufficient capacity for the dredged wastes.

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Notwithstanding your staff's sentiment that doing so would put "the cart before the horse," the Regional Board issued WDRs on October 15, 2004. WDR Order No. R5-2004-0137 ("Rescinded WDRs"). Friends and Deltakeeper petitioned the State Water Resources Control Board ("State Board") for review of that decision. In a draft Proposed Order ("Draft Order") dated April 22, 2005, staff for the State Board largely agreed with petitioners' complaints about the WDRs. A copy of the Draft Order is attached hereto as **Exhibit 1**.

Rather than allowing the Order to become final, the Port rescinded its application for WDRs for the prior project. Although the proposed dredging Project has been substantially revised, the Report of Waste Discharge and Tentative WDRs leave untouched, and in some cases actually weaken, numerous project components that the State Board found to be fatally inadequate. We urge the Regional Board to refrain from issuing WDRs until these significant environmental issues have been resolved.

I. THE TENTATIVE WDRs FAIL TO ENSURE THAT DREDGE WASTE IS CHARACTERIZED AND DISPOSED CONSISTENT WITH TITLE 27.

The Draft Order concluded that there has not been sufficient analysis, either by the Port or the Regional Board, of whether the dredged wastes contaminate groundwater and must be classified as "designated wastes." Draft Order at 8. Such characterization is vital to the determination of how such wastes are handled, and is therefore necessary prior to the issuing of WDRs purporting to regulate the treatment of such wastes. See Cal Code Regs., title 27 § 20200, 20210. The Draft Order noted that testing by the Port revealed that metals leach from dredge materials into groundwater, suggesting they *are* designated wastes. Draft Order at 6; Water Code § 13173. Even at the time the WDRs for the prior project were issued, Regional Board "staff could not concur with the Port that the wastes were inert." Draft Order at 8.

Although the rescinded WDRs required that the wastes be characterized prior to *disposal* at the dredged material disposal site ("DMD") (Rescinded WDRs, p.21 ¶ 6, p.27 ¶ 10), the State Board determined that waste characterization must occur prior to *issuance of WDRs*. "It is uncontraverted that the DMD was designed only for the disposal of inert waste and that, if the dredging spoils are determined to be designated wastes, those spoils cannot go to the DMD and the project must be significantly revised." Draft Order at 11.

The tentative WDRs for the revised Project still make no effort to definitively characterize the dredged waste as "designated" or "inert." As explained in the report by Steve Bond, the data the Port submitted to support its Report of Waste discharge does not even provide an adequate basis for making a characterization. Specifically, the Port's studies and the tentative WDRs do not address the fate of arsenic in the dredge waste, which has previously been shown

to leach to groundwater from the DMD. If anything, the Port's data suggests that the dredge wastes are in fact designated.

The requirement in the tentative WDRs that the Port reuse the dredged waste does not relieve the Regional Board of its duty to ensure that no designated waste is placed on the DMD without modifying the site to comply with liner requirements in Title 27. First, the material underlying the DMD does not isolate the wastes from groundwater. Although the tentative WDRs propose that the wastes be removed from the DMD prior to the next rainy season, they ignore the fact that the dredge slurry itself will contain millions of gallons of water, thus promoting leaching of soluble particles. Second, as Mr. Bond's report explains, the material underlying proposed reuse sites (Daggett Road and Neugebauer Road) have similar characteristics to those at the DMD, and will be similarly unprotective of groundwater. Moreover, as the tentative WDRs propose no groundwater quality monitoring at the reuse sites, the placement of designated wastes in those locations is entirely inappropriate.

Further, the tentative WDRs require only that the Port inform the Regional Board what the fate of the dredge waste was *following* its reuse. Tentative WDRs at pp.15-16. If the Port is to reuse these wastes, it must be required to gain the Regional Board's approval *prior* to doing so to ensure that wastes are not placed where they have the potential to contaminate ground or surface water.

Because the data indicates that the dredge material is designated waste, it may only be discharged to a lined waste management unit consistent with the requirements of Title 27. Cal Code Regs., title 27 § 20210.

II. THE TENTATIVE WDRs FAIL TO OFFSET THE PROJECT'S IMPACTS TO DISSOLVED OXYGEN.

The tentative WDRs fail in numerous respects to ensure that the Project complies with the Basin Plan and water quality objectives for dissolved oxygen ("DO"). *First*, the tentative WDRs contain no discharge prohibition that would require dredging to cease any time DO drops below water quality objectives, even though the Order describes such a measure as "appropriate." Tentative WDRs at p.11 ¶ 63. Instead, they contain a statement that dredging operations shall not cause the ambient pH to fall below 6.5 mg/L. Tentative WDRs, Prohibitions at p. 13 ¶7. They provide no basis for determining whether the dredging has caused the DO decline, and provide no consequence if the prohibition is violated. Even the rescinded WDRs provided that dredging operations would be prohibited anytime the ambient dissolved oxygen concentration in the Project area is less than 5.0 mg/l, or 6.0 mg/l from September 1 to

November 30 each year. Rescinded WDRs at 17, ¶ 9. This requirement must be retained in the WDRs for the modified dredging project.

Additionally, the proposed mitigation for the Project's impacts to DO is demonstrably inadequate. First, the Port proposes to operate a jet aerator currently operated by the Army Corps of Engineers to offset the Project's impacts to dissolved oxygen. However, the Corps is required to operate the aerator under certain triggering conditions from September 1 through November 30 pursuant to its own mitigation responsibilities for its deepening of the Stockton Deep Water Ship Channel. The Port's commitment to operate the device year round under the same triggering conditions does not account for the oxygen the Corps is already required to provide and therefore fails to provide any mitigation for the Project's impact on dissolved oxygen during the critical fall period. Moreover, as the National Marine Fisheries Service ("NMFS") stated in its biological opinion for the Port's application for a federal dredging permit, "[t]here will be little demonstrable benefit [from aeration] to listed salmonids once DO drops below 5 mg/L in the DWSC." BO at 53 (attached hereto as **Exhibit 2**). Therefore, the WDRs should at the very least revise triggering conditions for operation of the aeration device to ensure that DO never drops below 5 mg/L. The revised WDRs should also mandate that all dredging operations cease whenever DO falls below this threshold and establish effective and enforceable monitoring requirements to ensure compliance with this condition.

Second, Jones & Stokes disclosed in a January 2004 report, provided to the Regional Board with our comments on the Rescinded WDRs, that the aeration device *performs far below its design capacity*. See Jones and Stokes, Aeration Research and Implementation Analysis Study for the Stockton Deep Water Ship Channel (Jan. 2004). Although the study indicated that the actual performance of the device was difficult to measure, one measurement suggested that the device's south jet operates at about 75% of the design aeration capacity while the north jet operates at less than 20% design aeration capacity. *Id.* at 4-1. Therefore, instead of adding 2,500 lbs/day of oxygen, as relied upon in the EIR and WDRs, the device is only capable of producing closer to 1,150 lbs/day of oxygen. *Id.* Another measurement discussed in the same study indicates that the aerator's performance is even worse, at about 30% of the design capacity. *Id.* at 4-2. Although the Port has repeatedly promised over the last two years to take steps to enhance the aerator's performance, it has yet to identify a single method demonstrated to effectively do so. And although the rescinded WDRs at least provided for a "jet aerator operation maintenance plan" (Rescinded WDRs at p.28), the tentative WDRs for the modified dredging project requires no such plan.

Moreover, there is no evidence that the existing Corps of Engineer aerator provides *any* mitigation beyond a 50-foot radius from the aerator. Available information

suggests that oxygen inserted into the water column simply bubbles to the surface. As NMFS explained:

“[D]ata indicates that the effectiveness of this aerator to enhance DO levels in the channel may be limited. The range to which demonstrable increases in DO levels can be measured is less than 15 meters (approximately 50 feet) from the aerator itself. Salmonids passing close to the aerator could benefit from the increased DO, but NMFS believes that it is not likely to have a measurable effect at the dredging site along the West Complex waterfront (approximately 1 mile away), nor will it measurably improve the DO-impaired reach of the DWSC downstream of the dredging site.”

BO at 72. The State Board recognized that NMFS' Biological Opinion contains “critical information” that must be considered prior to issuance of WDRs. Draft Order at 10. The Port's (and the Regional Board's) failure to adjust the proposed DO mitigation plan in response to NMFS' findings in the Biological Opinion is deeply disturbing and clearly unlawful.

Third, the tentative WDRs would require that Project mitigation during September, October and November be met through operation of the proposed WDR Demonstration Project Aerator (Demonstration Aerator). However, the State Department of Water Resources is undertaking the Demonstration Aerator project as a short-term scientific investigation to determine if the assumptions of the TMDL technical advisory committee are accurate. It is unclear how a short-term investigation financed by state proposition funds can legally or technically meet the long-term mitigation requirements of a separate project.

III. THE TENTATIVE WDRs ARE NOT ADEQUATE TO PROTECT BIOLOGICAL RESOURCES FROM SIGNIFICANT IMPACTS DUE TO DREDGING.

The tentative WDRs fail to take even the most basic steps to protect fragile Delta fisheries. The *Recovery Plan for the Sacramento-San Joaquin Delta Native Fishes* (Nov. 1996), which contains actions that U.S. Fish and Wildlife Service (F&WS) believes are required to protect listed species, including delta smelt, longfin smelt, Sacramento splittail, Chinook salmon and Central Valley steelhead, recommends restricting dredging operations to between September 1 through November 30. The Port regularly dredges long after November 30. See DEIR at 5-6, 5-11. By failing to limit dredging operations to between September 1 and November 30, the WDRs fail to protect listed species. Moreover, because the Basin Plan identifies fresh water habitat, migration and warm water spawning as beneficial uses of the Sacramento-San Joaquin Delta, the impairment of this habitat by is inconsistent with the Basin Plan.

Also, the Army Corps of Engineers recently reinitiated Endangered Species Act section 7 consultation with NMFS for the Port's proposed dredging project due to two recent events. First, the Green Sturgeon has now been listed as a threatened species. 71 Fed. Reg. 17757 (April 7, 2006). Dredging impacts to Sturgeon are expected to be more acute even than they are to salmon. Second, critical habitat for listed salmonids was redefined in September 2005. A supplemental biological opinion analyzing the Project in light of these changes has not yet issued. Given the State Board's finding that the Regional Board should not have issued WDRs without first obtaining the "critical information" contained in NMFS original biological opinion, the Regional Board may not now issue WDRs for the modified dredging project without first obtaining NMFS' supplemental biological opinion for the Project. Draft Order at 10.

We recognize that the resulting delay in issuing WDRs may inconvenience the Port. However, the Port waited a for full year after it rescinded its original WDRs to file a new application for WDRs with the Regional Board. Thus, the bulk of the delay in the Port's dredging project is the result of the Port's own actions. Moreover, because, as a matter of federal law, the Port cannot obtain the required dredging permit from the Army Corps of Engineers until after the supplemental biological opinion issues, any delay in obtaining WDRs will not meaningfully prejudice the Port.

IV. THE WDRs MAY NOT BE LAWFULLY ISSUED BECAUSE THEY VIOLATE FEDERAL AND STATE ANTIDEGRADATION POLICIES.

The EPA has a policy of antidegradation for surface waters, which provides that states must maintain both designated beneficial uses and current uses, unless the designated use is shown to be unattainable or infeasible for a narrow set of reasons specified in federal regulations. 40 C.F.R. 131.10(g); 131.12. The State's antidegradation policy is broader than the federal policy, requiring protection of beneficial uses of groundwater in addition to surface water. See Memorandum from William R. Attwater, Chief Counsel of State Water Resources Control Board to Regional Board Executive Officers re. Federal Antidegradation Policy (Oct. 7, 1987).

Waste discharge requirements for new or increased discharges require an anti-degradation analysis. The tentative WDRs contain only a brief and conclusory discussion of antidegradation policies, which is based entirely on the faulty analysis of potential groundwater contamination, and inadequate mitigation of DO impacts described above. The Project plainly violates both federal and State antidegradation policies by impairing beneficial uses of surface and groundwater. Among other things, the Project would incrementally add to the impairment of

this segment of the San Joaquin River for habitat and spawning uses by failing to incorporate any mitigation for the decrease in dissolved oxygen during the critical dredging period, as described above. In fact, the Regional Board's failure to consider comments by NMFS, which questioned the operation of the aerator and its effectiveness in mitigating low dissolved oxygen and the potential impacts to migrating salmonids, illustrates that the Regional Board has failed to properly consider antidegradation policies.

The Project will also impair the groundwater for municipal uses because leaching from the DMD site to the groundwater is an unmitigated certainty. Therefore, the Regional Board must incorporate WDRs that avoid or fully mitigate for activities that impair surface and groundwater quality.

V. SUBSTANTIAL CHANGES TO THE PROJECT REQUIRE PREPARATION OF AN SEIR.

The Regional Board must require a subsequent or supplemental EIR ("SEIR") to analyze substantial changes to the Project. Pub. Res. Code § 21166; Cal. Code Regs., tit. 14, § 15162(a) ("Guidelines"). First, significant new information regarding the contamination of groundwater beneath the DMD site has come to light since the Port certified its EIR. Contaminated groundwater would trigger the requirements of Title 27 which mandate, among other things, that the Port line the DMD site to prevent further contamination. The potential impacts from lining the site have never been subject to environmental review.

Second, an SEIR is required to analyze the impacts of, and alternatives to, reusing dredged sediment. Experience has proven that dredge sediments have potential to contaminate both ground and surface water. Although the Port has attempted to evaluate those impacts in its RWD and supporting documentation with respect to dredged material stored at the DMD site, it has never done so for locations at which sediment may potentially be placed. Given the variation in soil character and conditions, site-specific analysis of potential contamination due to dredged sediments is necessary. This impact has never previously been subject to CEQA review, and cannot be approved by the Regional Board without first requiring an SEIR.

In addition, if the Port proposes to fulfill its dissolved oxygen mitigation responsibility by utilizing pure oxygen gas in its existing aerator (see Jones & Stokes, Administrative Draft: Port of Stockton Aerator Performance Assessment at p. 7 (Sept. 2004)), it must first analyze potentially significant impacts of pure oxygen on sensitive fish species in an SEIR. *The Port's EIR nowhere even mentioned, let alone analyzed the impacts from, using pure oxygen.*

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VI. THE REGIONAL BOARD MUST IDENTIFY FEASIBLE MITIGATION MEASURES FOR THE DIRECT AND INDIRECT IMPACTS OF ISSUING THE WDRs.

As a CEQA responsible agency for the Port's proposed expansion, the Regional Board may not issue the WDRs if any feasible alternatives or mitigation measures are available to substantially lessen the direct or indirect environmental effects of the Regional Board's action. Guidelines § 15096(g). The Regional Board is also required to make findings for each significant effect of the Project that mitigation measures are adequate to avoid or substantially lessen such effect or that unavoidable adverse impacts are outweighed by social or other benefits. See Guidelines § 15096(h). Until it makes such findings, the Regional Board may not lawfully issue WDRs.

CONCLUSION

In order to comply with CEQA and cure the WDRs numerous defects identified in this letter and the separate report by Steve Bond, the Regional Board must certify an SEIR analyzing the substantially revised Project, and must reissue revised tentative WDRs for public review and comment that are capable of ensuring that the Project will not adversely affect the quality of the Bay-Delta environment and the health of its residents.

Very truly yours,

SHUTE, MIHALY & WEINBERGER LLP

A handwritten signature in dark ink, appearing to read 'R. Perl', with a long horizontal flourish extending to the right.

Robert "Perl" Perlmutter

cc: Richard Aschieris, Port of Stockton (without Exhibit 2)
Marc Fugler, Army Corps of Engineers (without Exhibit 2)
Jeff Stuart, NMFS (without Exhibit 2)
Sue McConnell, Regional Board Staff
Philip Giovannini, Regional Board Staff
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